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In The
Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

HOWARD BROWN,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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Legal Parties to the Proceeding

All Parties are named in the caption of this cause. There are no entities pursuant to Rule 29.6.

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REASONS FOR DENYING THE WRIT

In its Petition for Writ of Certiorari, the State of Tennessee is seeking to overturn a decision of the Tennessee Supreme Court which reversed a conviction for aggravated rape. The state's petition broadly and wildly overstates the true nature of the holding in the Opinion, which is limited to a particularly narrow factual situation. The Opinion of the Tennessee Supreme Court does not, as the Petition argues, make any ruling that the defendant's right to present a defense "trumps" Tennessee's statutory and decisional rules against the admission of hearsay. On the contrary, the holding of the Tennessee Supreme Court in State v. Brown strictly and narrowly follows the prior law of this Court established in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) and Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). In following the rulings of this Court, and consistent with rulings of several other jurisdictions, the Tennessee Supreme Court merely held that, in the particular facts of the record of State v. Brown, the defendant should have been allowed to introduce relevant and reliable hearsay evidence in order to present a defense to a child sex abuse allegation, where the State chose to place the physical condition of the complainant's hymen into evidence to corroborate her claim. The decision will not have far-reaching implications in any jurisdiction.

I.

I. NEITHER THE RECORD NOR THE DECISION BELOW RAISES THE QUESTION PRESENTED BY THE PETITION

The State's petition grossly misstates and exaggerates the actual holding of the

Tennessee Supreme Court. There has been no holding by the Tennessee Supreme Court that the defendant has some sort of automatic right to present otherwise inadmissible hearsay, as the petition shrilly claims.

Prior to trial, the State gave the defendant notice that it intended to rely upon the testimony of a physician, Dr. Robert Kelly Dickson, M.D., to corroborate the allegations of the complainant. Dr. Dickson performed a pelvic examination upon the complainant in December, 1991, some months after the sexual assault is alleged to have occurred. Dr. Dickson's examination of the complainant's hymen revealed evidence that she had likely experienced sexual intercourse. Prior to trial, the defendant filed notice pursuant to Tennessee's Rape Shield Law, Tenn. R. Evid. 412, that he intended to call witnesses who had heard the complainant making statements concerning her consensual sexual activity with another youth. One of the witnesses had witnessed the complainant and her young friend engaging in petting.

At the start of trial, the trial court struck the defendant's Rule 412 notice, holding that it was not specific enough. The effect of this ruling by the trial court was that the jury was not allowed to hear the testimony of the two witnesses concerning the complainant's sexual activity with other individuals (as an explanation for the medical evidence). More importantly, by striking the Rule 412 notice, the defendant was not allowed to question the complainant about her extraneous sexual activity, or to confront her with the statements she had made to others about it. As such, the jurors were given a swearing match between the complainant and her stepfather. The

complainant was given the distinct advantage of having her allegations corroborated by a medical doctor who testified that she was not a virgin, while the defendant was crippled and hamstrung by not being allowed to provide the jurors with a relevant and credible explanation for the condition of the accuser's vagina.

The jury held this deficit against the defendant. He was charged in a four-count presentment that alleged acts of vaginal intercourse, cunnilingus, fellatio and fondling. He was only convicted of the count alleging vaginal intercourse—the only count for which the state presented corroborating forensic evidence.

Upon the initial appeal of this cause, the Court of Criminal Appeals of Tennessee, Eastern Division, held that the trial court erred when it struck the defendant's Rule 412 notice (thereby precluding him from presenting the testimony of the witnesses to the complainant's extraneous sexual activity and from questioning the complainant, herself, about it), and that the proffered testimony and line of inquiry were, indeed, relevant under the rule to rebut or explain medical or scientific evidence. Tenn. R. Evid. 412(c)(4)(i). However, the Court of Criminal Appeals found that this error was essentially harmless, since the evidence proffered under the Rule 412 notice was inadmissible hearsay, anyway.

Facing with a unique set of circumstances, with a particular set of procedural errors committed at the trial level, the Tennessee Supreme Court, applying established precedent rooted in Constitutional principles, issued a ruling concerning the fact-specific record of the case. The Tennessee Supreme Court held that, under the facts of this particular record, the defendant's right under the Sixth and Fourteenth

Amendment to present a defense was violated by the rigid application of a state hearsay rule.

II. THE RULING DOES NOT CONFLICT WITH CHAMBERS V. MISSISSIPPI, NOR INTERFERE WITH STATE-ESTABLISHED RULES CONCERNING THE ADMISSIBILITY OF EVIDENCE

The ruling of the Tennessee Supreme Court follows the rulings of this Court in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2 297 (1973) and Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). Both of these decisions recognized that, in certain unique circumstances, the rigid application of a state evidentiary rule must yield if it would have the effect of precluding the defendant from presenting a defense. In its petition, the State apparently seeks to overrule precedent that is more than 20 years old.

Both Chambers and Green dealt with unique, fact-specific cases where the application of a state evidentiary rule had the effect of preventing the defendant from putting on a defense. In Chambers, the State of Mississippi's "voucher" rule prevented the murder defendant from calling a witness who had confessed to the crime, since the witness would have been "impeached" by being questioned adversely. Although the State of Mississippi certainly had a legitimate interest in requiring attorneys to call only reliable witnesses to testify, this public policy could not be allowed to impede a defendant's Sixth Amendment right to present favorable

witnesses, as well as his Due Process rights under the 14th Amendment. Likewise, in Green, the evidentiary rules established by the State of Georgia were not allowed to prevent a defendant from presenting hearsay testimony that another individual had confessed to the crime.

Nothing in either decision has operated to prevent the states of Mississippi or Georgia, or any other jurisdiction, from creating its own body of procedural and substantive rules to regulate the admission of evidence and ensure the reliability of proof. On the contrary, the Chambers decision clearly states that it entails no "diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." Chambers, 410 U.S. at 302-303.

The holding of the Tennessee Supreme Court in Brown is equally limited in its scope, and explicitly expresses this point. The Opinion explicitly states that it does not abolish any of Tennessee's rules against hearsay or the State's rape shield law. It further explicitly holds that its ruling is particular to the facts of this trial record.

III. THE HOLDING OF THE TENNESSEE SUPREME COURT IS LIMITED TO DISCRETE FACTUAL SITUATIONS

A. THE HOLDING IS LIMITED IN ITS APPLICATION

In Brown, the Tennessee Supreme Court was faced with an examination of the defendant's rights where a rigid application of evidentiary rules concerning hearsay, and a trial court error misapplying the Tennessee Rape Shield Law, created a unique situation. Moreover, there were unique evidentiary events which helped shape and

create the dilemma.

The medical examination of the complainant did not occur until after the passage of a significant period of time following the alleged occurrence of the sexual assault. It was solely the decision of the State to present the testimony of the physician with his information that the complainant had engaged in sexual intercourse. Where the state has undertaken to corroborate a claim of sexual assault with evidence that the complainant has experienced vaginal penetration, the defendant is entitled to impeach her with her prior inconsistent statements which provide an alternate explanation for the medical testimony.

The decision of the Tennessee Supreme Court is not only limited in its application; it is completely consistent with the law of other jurisdictions where the prosecution chooses to corroborate a claim of sexual assault with forensic evidence that the complainant has experienced sexual intercourse. In People v. Mason, 578 N.E.2d 1351(Ill. App. Ct. 1991), the Court of Appeals of Illinois held that the defendant had a due process right to introduce evidence to explain the injury to the minor complainant's hymen. In Tague v. Richardson, 3 F.2d 1133 (7th Cir. 1993) the Seventh Circuit Court of Appeals found error where a defendant was not allowed to present evidence concerning a prior molestation of the complainant, where the state chose to present evidence of her hymenal injury to corroborate her allegations against the defendant. In State v. Reinart, 440 N.W.2d 503 (N.D. 1989), the Supreme Court of North Dakota held that a 14-year-old complainant could be cross-examined about other possible sexual partners where the prosecution has offered medical evidence

showing that she has experienced vaginal penetration.

None of these decisions has had the effect of overruling the Rape Shield Laws of any of these jurisdictions, or of giving defendants any sort of automatic evidentiary "trump" card.

B. THE HOLDING REQUIRES TRIAL COURTS TO PERFORM A THOROUGH BALANCING TEST AND FACT-SPECIFIC ANALYSIS

The decision of the Tennessee Supreme Court follows the explicit principles established in Chambers. The Opinion holds that there must be an analysis of (1) whether the excluded evidence is critical to the defense; (2) whether the evidence bears sufficient indicia of reliability; and (3) whether the interest supporting exclusion of the evidence is substantially important. See Chambers, 410 U.S. at 298-301, 93 S.Ct. at 1047-49. In applying the factors established by Chambers, the Tennessee Supreme Court determined that the evidence was, indeed, critical, since it rebutted the state's medical proof. In determining that the proffered hearsay was credible, the Court pointed out that an analysis of the record revealed no suggested motive for the witnesses to fabricate their testimony. Furthermore, the proffered evidence was quite similar to an admission by a party opponent, which is totally admissible under Tenn. R. Evid. 803 (1.2)(A). The only reason these statements would not be admissible to impeach the complainant was that she was not technically a "party" to the prosecution, since it was brought by the State of Tennessee. Finally, the Court held that the defendant had a compelling interest in presenting the evidence which outweighed the state's interest in rigidly and mechanistically enforcing a rule against

hearsay.

IV. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS

The decision of the Tennessee Supreme Court is consistent with principles of Constitutional law established by rulings of this Court. The opinion is also consistent with holdings of other jurisdictions faced with similar factual scenarios. There is nothing novel, arbitrary or unexpected about the ruling of the Tennessee Supreme Court, in light of the particularly unique set of circumstances found in this trial record. Rather, the decision was a proper and cautious application of well-established law.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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